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NO. 70-5064
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1970

RUTH J. JEFFERSON, ET AL.,
Appellants

vs.

BURTON G. HACKNEY, ET AL.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION.

BRIEF FOR APPELLEES

CRAWFORD C. MARTIN
Attorney General of Texas
NOLA WHITE
First Assistant Attorney General
ALFRED WALKER
Executive Assistant Attorney General
J. C. DAVIS
Assistant Attorney General
PAT BAILEY
Assistant Attorney General
P. O. Box 12548
Capitol Station
Austin, Texas 78711
Attorneys for Appellees

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BRIEF FOR APPELLEES

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES

COME NOW the Appellees, Burton G. Hackney, Commissioner of the Texas State Department of Public Welfare, Will Bond, Chairman of the Texas State Board of Public Welfare, W. Kendall Baker, Vice-Chairman of the Texas State Board of Public Welfare, Louis Sarazan, Secretary of the Texas State Board of Public Welfare, and Rosalind Giles, Director of Field Staff, Dallas Regional Office of the Texas State Department of Public Welfare, and file Appellees' Brief in response to Appellants' Brief heretofore filed.

STATEMENT OF THE CASE

This is an appeal by the Appellants, Ruth J. Jefferson, Emma Gibson and Jose Apolinar Vasquez, from the judgment entered below on the 4th day of August, 1970, (App. 160), in a class action commenced by the Appellants against the Appellees, officials of the Texas Department of Public Welfare, wherein the Appellants sought: (1) a declaratory judgment holding invalid certain regulations of the Texas State Department of Public Welfare which limited AFDC grants to a specified percentage of recognized needs; (2) an injunction to restrain the implementation of these regulations of the Texas Department of Public Welfare which restrict the amount of assistance for AFDC recipients to a percentage of unmet or recognized budgetary need which is less than that granted to recipients in the other categories of welfare assistance, namely, OAA (Old Age Assistance), AB (Aid to the Blind), and APTD (Aid to the Permanently and Totally Disabled); and (3) an injunction prohibiting payments of assistance less than the unmet budgetary needs.

The Appellants are recipients of the Aid to Families with Dependent Children program (AFDC) administered by the State of Texas through the Texas State Department of Public Welfare pursuant to the provisions of Article 695c, Vernon's Civil Statutes. The AFDC program is one of several similar programs for needy persons in the State of Texas which is operated on a cooperative basis with the Federal Government pursuant to the Social Security Act and specifically 42 U.S.C. §601, et seq.

The Appellants' contentions in regard to the challenged regulations and action by the State of Texas were that they violated the Equal Protection Clause

of the Fourteenth Amendment and violated the provisions of the Social Security Act, and specifically 42 U.S.C. §602(a)(23) thereof.

The court below entered judgment on the 1st day of July, 1969 (App. 109), amended in certain respects on the 14th day of August, 1969 (App. 155), on the grounds set forth in the written opinion (App. 112). The court below denied the relief sought by Appellants pursuant to their Equal Protection Clause argument, but sustained the position of the Appellants in connection with their statutory contentions.

On appeal from the initial judgment of the court below, this Court on May 4, 1970 (App. 158), vacated the judgment of the court below for further consideration in light of *Rosado v. Wyman*, 397 U.S. 397, thereafter, the court below on the 4th day of August, 1970, entered its judgment (App. 160) denying the relief sought by the Appellants upon both the statutory and Equal Protection grounds urged by Appellants.

Thereafter, on the 14th day of August, 1970, the Appellants sought to have the court below amend its judgment because of the manner in which the Appellees were determining eligibility of AFDC applicants, an issue neither plead nor urged heretofore (App. 163). The court below denied the requested amendment sought by Appellants on the 23rd day of September, 1970 (App. 170).

From the foregoing Appellants gave notice of appeal (App. 171), and on the 12th day of October, 1971, this Court noted probable jurisdiction (App. 172).

OPINION BELOW

The opinion of the United States District Court for the Northern District of Texas, Dallas Division,

rendered on the 1st day of July, 1969, is reported as *Jefferson, et al. v. Hackney, et al.*, 304 F.Supp 1332 1969), and is also set forth in the Appendix at page 112.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. The Fourteenth Amendment to the Constitution of the United States provides in part that:

> "... nor shall any state ... deny to any person within its jurisdiction the equal protection of the the laws."

2. Section 601 of the Civil Rights Act of 1964, 42 U.S.C. §2000-d, provides that:

> "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

3. Section 402(a)(23) of the Social Security Act, 42 U.S.C. §602(a)(23), provides in part that:

> "A State plan for aid and services to needy families with children must ....
>
> "(23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

4. The regulations here challenged by the Appellants are set forth in their entirety in Office Memorandums E-430 and E-434 (App. 94-108).

QUESTIONS PRESENTED

1. Whether the payment by Texas of a substantially lower percentage of State determined needs to recipients of AFDC than is provided to recipients with the same needs in the adult programs, OAA, AB and APTD, deprives Appellants of the equal protection of the laws to which they are entitled, and of their right under the Civil Rights Act of 1964 to be free from racial discrimination in a federally financed program?

2. Whether the use by Texas of something other than the adjusted standard of need in determining eligibility for benefits pursuant to the AFDC program violates Section 402(a)(23) of the Social Security Act?

SUMMARY OF ARGUMENT

The Appellants, in their initial question presented to this Court for consideration, are actually complaining about the allocation of available funds which the Legislature of the State of Texas has made between the four categories of welfare recipients in Texas.

The Constitution of the State of Texas places a limit upon the total amount of funds which the Legislature of the State of Texas can appropriate for the fiscal funding of welfare assistance grants for the categorical welfare assistance programs. The allocation of the available funds between the four categories of welfare recipients by the Legislature is the basis for Appellants' complaint that there has been a violation of the Equal Protection Clause of the Fourteenth Amendment and the Civil Rights Act of 1964.

The thrust of Appellants' argument is twofold. First, the Appellants urge that any allocation of funds between the various categories of welfare assistance

must result in each category of welfare assistance being paid the same percentage of recognized need and that there can be no variance between the categories in percentage of recognized need paid. At the time of the initial proceeding in this case Texas was paying 100% of recognized need in OAA, 95% in APTD, 95% in AB and 50% in AFDC.

Secondly, the Appellants have urged that the reason for the difference in allocation of funds between the various categories of welfare assistance programs by the Legislature of Texas is racially motivated or has the effect of discriminating against minority groups.

The Appellees submit, in rebuttal to Appellants contentions, that the allocation of funds by the Legislature of Texas between the various categories of welfare assistance is neither a violation of the Equal Protection Clause of the 14th Amendment to the Constitution of the United States nor the Civil Rights Act of 1964. Such cases as *King v. Smith,* 392 U.S. 309 (1968) and *Dandridge v. Williams,* 397 U.S. 471 (1970) clearly recognize that the states have great latitude in dispensing available funds, and in the instant case there exists constitutionally sufficient reasons for the allocation of funds between the various categories of welfare programs in the manner which was done by the Legislature of the State of Texas.

As to Appellants' argument concerning racial implications allegedly involved in the allocation of funds between the welfare programs, the record before this Court clearly demonstrates, as the court below so held, that such allocations were neither motivated by nor resulted in discrimination against minority groups.

The final question raised by the Appellants in this appeal concerns itself with whether the provisions of

42 U.S.C. §602(a)(23), which required the states by July 1, 1969, to adjust the amounts used in determining the need of individuals to reflect changes in living costs, will be extended in such manner as to require the states to use this adjusted standard of need as the only basis of determining eligibility to receive welfare benefits.

Contrary to the position of the Appellants, the Appellees submit that neither the provisions of 42 U.S.C. §602(a)(23) nor the decision of this Court in *Rosado v. Wyman,* 397 U.S. 397 (1970), deal with any other issue than that of requiring that the states adjust their recognized standards of needs to reflect the cost of living increases. 42 U.S.C. §602(a)(23) requires no adjustment of eligibility requirements, only recognized standards of need, and this Court did not in *Rosado v. Wyman, supra,* nor should it have, required an adjustment of eligibility requirements such as sought by Appellants. This Court in *Rosado v. Wyman* specifically rejected a contention that 42 U.S.C. §602 (a)(23) required an absolute increase in benefit levels and left the states free to employ ratable reductions, such as Texas has done. It would indeed be inconsistent to take this position as to the standards of need issue and then resort to an entirely different concept in determining eligibility.

In addition, the only statutory basis asserted by Appellants in this appeal deals with an issue not related to the Appellants or the class they represent. No Appellant in this appeal has been denied eligibility and no justiciable controversy as to this issue exists between the parties.

ARGUMENT

"Whether the payment by Texas of a substantially lower percentage of State determined needs

to recipients of AFDC than is provided to recipients with the same needs in the adult programs, OAA, AB and APTD, deprive Appellants of the equal protection of the laws to which they are entitled, and of their right under the Civil Rights Act of 1964 to be free from racial discrimination in a federally financed program?"

The equal protection and civil rights arguments of the Appellants are based entirely upon the manner in which the Legislature of the State of Texas has allocated the available funds between the categorical welfare assistance programs administered by the State of Texas. Because of the allocation of funds by the Legislature to these various welfare assistance programs at the time this proceeding commenced the Appellees were able to pay 100% of the recognized need in the OAA program, 95% in the AB program, 95% in the APTD program, and 50% in the AFDC program. (Since the commencement of this proceeding the State of Texas has, by amendment of its Constitution, increased the ceiling on welfare assistance grants from $60,000,000 to $80,000,000 and the percentage of recognized need which can be paid in the AFDC program has increased from 50% to 75%.)

The Appellants first contend that there has been a violation of the Appellants' Fourteenth Amendment rights under the Equal Protection Clause because the Legislature has appropriated the available funds it has for welfare assistance grants between the various categories of welfare recipients in such a manner as to discriminate against one segment of needy individuals —namely, those in the AFDC program. Appellants contend that the allocation of these available funds must be made between OAA, AB, APTD and AFDC

in such a manner that no program will receive any preference or different treatment than another.

To more clearly reply to Appellants' contentions it would be advisable at this point to set forth some of the history of the development of welfare assistance in Texas as well as the general fiscal operations involved.

In 1935 Congress provided for the various categories of public welfare—Old Age Assistance (OAA) 42 U.S.C. Sec. 301, Aid to Families with Dependent Children (AFDC) 42 U.S.C. Sec. 601, Aid to the Blind (AB) 42 U.S.C. Sec. 1201, and Aid to the Permanently and Totally Disabled (APTD) 42 U.S.C. Sec. 1351.

Section 51-a of Article III of the Constitution of Texas authorizes the Legislature of the State of Texas to provide for assistance grants for Old Age Assistance (OAA), Aid to the Blind (AB), Aid to the Permanently and Totally Disabled (APTD), and Aid to Families with Dependent Children (AFDC), and medical assistance for all non-categories. However, such constitutional provision limited the Legislature to an expenditure of $60,000,000 for assistance grants for the four categories for any one year at the time of the commencement of this litigation. A constitutional amendment has since been enacted raising the constitutional limit to $80,000,000.

The significance of the foregoing constitutional provision can more readily be seen when considered with Section 51 of Article III of the Constitution of Texas which places a prohibition upon the Legislature that it:

> ". . . shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individu-

als, municipal or other corporations whatsoever . . ."

Section 51-a of Article III of the Constitution of Texas acts as an exception to the provisions of Section 51 of Article III of the Constitution of Texas, and thereby allows the Legislature to participate in OAA, AB, APTD and AFDC programs. However, the extent of such participation was limited by the Constitution of Texas to $60,000,000 for assistance grants at the time this suit commenced and is still limited but such limit has been increased to $80,000,000.

House Bill 5, Acts 60th Legislature, First Called Session, 1968, was the General Appropriations Bill for the State of Texas for the fiscal year commencing September 1, 1968, and ending August 31, 1969, the period when this suit was filed. In the departmental appropriation to the Texas Department of Public Welfare, the Legislature had appropriated the sum of $48,200,000 for assistance payments to OAA recipients; the sum of $1,400,000 for assistance payments to AB recipients; the sum of $4,250,000 for assistance payments to APTD recipients; and the sum of $6,150,000 for assistance payments to AFDC recipients.

At the present time, in the departmental appropriation to the Texas State Department of Public Welfare, the Legislature of the State of Texas has appropriated the sum of $50,000,000 for assistance payments to OAA recipients; the sum of $1,400,000 for assistance payments to AB recipients; the sum of $5,500,000 for assistance payments to APTD recipients; and the sum of $23,100,000 for assistance payments to AFDC recipients. As can be readily seen the money allocated by the Texas Legislature to AFDC has almost quadrupled in the last two years while the allocation to other categories has remained the same or risen only slightly.

It might also prove helpful at this point to provide a historical background regarding the development of welfare funding in Texas which has its basic source in the Texas Constitution.

In 1933, Section 51-a of Article III of the Constitution of Texas was adopted which authorized the issuance and sale of bonds of the State of Texas not to exceed the sum of $20,000,000, ". . . the proceeds of the sale of such bonds to be used in financing relief and work relief to needy and distressed people and in relieving the hardships resulting from unemployment . . ." S.J.R. No. 30 of the 43rd Legislature, 1933.

In 1935, the Constitution was again amended so as to authorize Old Age Assistance to "actual bona fide citizens of Texas who are over the age of sixty-five (65) years . . ." H.J.R. No. 19 of the 44th Legislature, 1935. Article III, Section 51-b, Constitution of Texas. The maximum grant out of State funds was $15.00 per month per recipient.

In 1937, the Constitution was amended to provide for assistance "to destitute children under the age of fourteen (14) years . . ." H.J.R. No. 26-a of the 44th Legislature, 1937. Article III, Section 51-d of the Constitution of Texas. The maximum grant out of State funds was not to exceed $8.00 per month for one child, nor more than $12.00 per month for children in one family, with a maximum overall limit out of State funds not to exceed $1,500,000 per year.

In 1945, the above referred to amendments were consolidated into Section 51-a of Article III of the Constitution of Texas, as well as broadening the class of citizens eligible to receive grants of public moneys by the State of Texas. H.J.R. No. 13 of the 49th Legislature, 1945. The foregoing limited payments out of State funds per individual to $20.00 for Old Age

Assistance; provided no individual limit for Aid to the Blind; and removed the maximum for Aid to Dependent Children; and placed a $35,000,000 per year limit on State funds for the three programs combined.

In 1954, an amendment was made to Section 51-a of Article III of the Constitution of Texas. S.J.R. No. 7 of the 53rd Legislature. This provision provided a maximum of $20.00 out of State funds for Old Age Assistance per individual and raised the ceiling of total expenditures on the part of the State from $35,000,000 to $42,000,000.

In 1956, amendments to Article III, Section 51-b-1 were adopted. H.J.R. No. 30 of the 54th Legislature. This provided for Aid to the Permanently and Totally Disabled and placed a limit not to exceed $20.00 per month per individual, and a total overall maximum out of State funds not to exceed $1,500,000 per year.

In 1958, Section 51-a-1, Article III of the Constitution of Texas was added. H.J.R. No. 36 of the 55th Legislature. This provided for vendor medical care on behalf of Old Age Assistance, Aid to the Blind, Aid to Dependent Children and Aid to the Permanently and Totally Disabled. The only limit as to amounts was that the expenditure of State funds could not exceed payments out of Federal funds.

In 1957, an amendment was adopted to Section 51-a of Article III of the Constitution of Texas. H.J.R. No. 2 of the 55th Legislature. This amendment placed a maximum of $25.00 per Old Age Assistance recipient, or $21.00 until additional amounts were matched by the Federal Government. This provision raised the ceiling from $42,000,000 to $47,000,000 payable from State funds.

In 1962, an amendment was enacted to Section 51-a of Article III of the Constitution of Texas. S.J.R. No. 9 of the 57th Legislature. This constitutional amendment raised the ceiling from $47,000,000 to $52,000,000 for Old Age Assistance, Aid to the Blind, and Aid to Dependent Children. This provision retained the maximum of $25.00 per individual Old Age Assistance recipient.

In 1962, an amendment was made to Section 51-b of Article III of the Constitution of Texas. S.J.R. No. 7 of the 57th Legislature. It raised the ceiling in connection with the Aid to the Permanently and Totally Disabled from $1,500,000 to $2,500,000.

In 1963, an amendment was made combining Sections 51-a and 51-b-1 of Article III of the Constitution of Texas to be known as Article 51-a. It dealt with Old Age Assistance, Aid to the Blind, Aid to Dependent Children and Aid to the Permanently and Totally Disabled. This provision raised the ceiling from $52,000,000 to $60,000,000 and changed residence requirements on all programs. The dollar maximum on individual Old Age Assistance cases was deleted. S.J.R. No. 21 of the 58th Legislature.

In 1965, an amendment combined Section 51-a and Subsections 51-a-1 and 51-a-2 of Article III of the Constitution of Texas to be known as Section 51-a of Article III of the Constitution of Texas. It provided for assistance grants for Old Age Assistance, Aid to the Blind, Aid to Families with Dependent Children and Aid to the Permanently and Totally Disabled, and medical assistance for all categories, and medical assistance for all non-categories. A $60,000,000 maximum on grants only was retained. H.J.R. No. 81 of the 59th Legislature.

S.J.R. No. 8 of the 61st Legislature, which was adopted on August 5, 1969, constitutes the present Section 51-a of Article III of the Constitution of Texas. The ceiling was raised from $60,000,000 to $80,000,000 on assistance grants which could be made to the four categories of recipients—the aged (OAA), the blind (AB), the totally and permanently disabled (APTD) and dependent children (AFDC).

See also *Jefferson v. Hackney,* 304 F.Supp. 1332 (N.D. Tex. 1969) (App. 112) for a further historical background of the constitutional amendments pertaining to public welfare assistance.

As can be seen by the foregoing development of welfare assistance in Texas, the Legislature has always been limited by the Constitution of Texas in the total amount of public funds it may appropriate for welfare assistance grants and is presently operating under an $80,000,000 limitation. In addition, it was only by constitutional amendment in 1965 that the Legislature of Texas was freed from the additional constitutional limitation as to the amount of public funds which it could allocate by appropriation between the various categories of welfare assistance.

Consequently, for only a period of six years has the Legislature had any discretion as to how the allocation of available funds between the various categories would be made.

With this background in mind, of what merit is there to Appellants' initial contention that the allocation of funds by the Legislature of Texas must be done in a completely equal manner whereby no particular category of public assistance recipients is favored, in the division of public funds, over another? Appellees submit that this contention is wholly lacking in

merit and has already been decided adversely to Appellants by this Court.

In *King v. Smith,* 88 S.Ct. 2128, 392 U.S. 309, 20 L.Ed.2d 1118 (1968), this Court had before it a case dealing with the AFDC program, and in its opinion stated that:

> ". . . There is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits *by the amount of funds it devotes to the program.* . . ." (Emphasis added.)

In *Dandridge v. Williams,* 397 U.S. 471 (1970), this Court had before it another case dealing with the AFDC program, and held that:

> "In King v. Smith, supra, we stressed the States' 'undisputed power,' under these provisions of the Social Security Act, 'to set the level of benefits and the standard of need.' Id. at 334. We described the AFDC enterprise as 'a scheme of cooperative federalism,' id., at 316, and noted carefully that '[t]here is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program.' Id., at 318-319.
>
> "Congress was itself cognizant of the limitations on state resources from the very outset of the federal welfare program. The first section of the Act, 42 U.S.C. §601 (1964 ed., Supp. IV), provides that the Act is
>
> > 'For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, *as far as practicable under the conditions in such State,* to

needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection. . . .' (Emphasis added.)

Thus the starting point of the statutory analysis must be a recognition that the federal law gives each State great latitude in dispensing its available funds."

The foregoing authorities leave no doubt that the states are given wide latitude in how they feel they can make best use of their limited fiscal resources in administering their welfare programs.

As noted by the court below in its opinion:

"The Texas Legislature was confronted with a ceiling of $60,000,000.00 to be spent for the four categories of public welfare. No more than that amount could be appropriated by the Legislature and *it was the duty of the Legislature to use its judgment in the manner and the amount the available money should be divided.*" (Emphasis added.)

This statement clearly recognizes the legislative rather than judicial function involved in the allocation of public funds by state legislative bodies, and discloses that the court below has followed that warning sounded by this Court in its very last statement in *Dandridge v. Williams, supra,* when it stated:

". . . the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients. Cf. Steward Mach. Co. v. Davis, 301 U.S. 548, 584-585; Helvering v. Davis, 301 U.S. 619, 644."

In the instant case there are certainly numerous reasons why the Legislature of the State of Texas might see fit to spend less money on the AFDC program than on the programs dealing with aid to the aged, blind and disabled In the case of the aged, the blind and the disabled, their circumstances are unlikely to ever improve, and their opportunities for gainful employment are practically nil. In addition, there is frequently no one to whom the State can look who is legally responsible for caring for this class of individuals. However, this is not true as applied to the AFDC program. To start with, these needy children as they mature will hopefully be gainfully employed and no longer in need of welfare assistance. Also, many of the needy children are of an age where they themselves can contribute financially to their standard of living, by working and frequently the parent or parents of the children are young and can obtain gainful employment. In addition, there is frequently someone to whom the State can resort for contributions to the support of the needy children—for example, a divorced father by way of child support payments.

It is submitted that the foregoing constitutes ample reason for the Legislature of the State of Texas in deciding to allot a lesser amount of money for the operation of the AFDC program than to programs involved with the care of the aged, disabled and blind.

The court below also recognized the various constitutionally sufficient reasons that the Legislature could have considered in the allocation of funds between the various programs and concluded that:

> "Considering the different purposes of programs in the Social Security Act and the differences in the capacity for self-help among recipients in the various categories, we cannot say that

the action of the Legislature in providing less assistance for AFDC recipients than for the other recipients of welfare was 'without any reasonable basis and therefore . . . purely arbitrary.' Morey v. Doud, supra."

It might also be noted at this point that the Appellants also complain of the fact that the court below used the traditional equal protection test in passing upon the action of the Legislature of Texas rather than applying the "compelling interest test" whereby the State would be required to show some compelling governmental interest to justify the difference in allocation of public funds between the welfare programs.

However, this Court in *Dandridge v. Williams, supra,* disposed of this question adversely to Appellants' position when it held:

"In the area of economics and social welfare a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' McGowan v. Maryland, 366 U.S. 420, 426.

"To be sure, the cases cited, and many others enunciating this fundamental standard under the Equal Protection Clause, have in the main involved state regulation of business or industry. The administration of public welfare assistance,

by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we find no basis for applying a different constitutional standard. See Snell v. Wyman, 281 F.Supp. 853, aff'd, 393 U.S. 323. It is a standard that has consistently been applied to state legislation restricting the availability of employment opportunities. Goesaert v. Cleary, 335 U.S. 464; Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552. See also Flemming v. Nestor, 363 U.S. 603. And it is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy."

Consequently, the Appellees submit that the initial argument advanced by Appellants, that there must be an equal allocation between the various categories of welfare programs to satisfy the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, is lacking in merit and the court below was correct in so holding.

In a footnote to the previously cited statement in *Dandridge v. Williams, supra,* the Court noted that it was important to note that there was no contention that the Maryland regulation being challenged was infected with a racially discriminatory purpose or effect such as to make it inherently suspect. This then brings us to the second aspect of Appellants' initial question.

The Appellants contend that the reason for the difference in monetary allocation between the various categories of welfare assistance programs by the Legislature of Texas was racially motivated or has the effect of discriminating against minority groups. Such

assertions are ones easily made, but often difficult for the accused to rebut especially if naked assertions are allowed to suffice for proof.

Appellees submit that Appellants' argument of racial motivation or effect constitutes nothing more than unsupported allegations and the record before this Court lends itself to no other conclusion, as was recognized by the court below when it held:

> "Under the foregoing undisputed facts we are of the opinion that plaintiffs have failed to make a sufficient showing of racial or ethnic discrimination to require us to declare void under the Equal Protection clause or under the Civil Rights Act of 1964 either the Legislative Appropriations bill or Section 51-a of Article III of the Texas Constitution."

A review of the evidence in the record is the only way to discover the lack of merit in Appellants' contentions, and in this respect the comments of the court below are most revealing and are set forth as follows:

> "Plaintiffs' next contention is that the discrimination against the AFDC recipients vis-a-vis other welfare recipients is the result of racial or ethnic prejudice and is violative of the Equal Protection clause of the Fourteenth Amendment and a violation of the federal civil rights enactments.
>
> "Plaintiffs point to past policies in Texas as evidence that the reductions in AFDC benefits were racially discriminatory. Plaintiffs specifically point to the 'man in the house' policy prior to the decision in King v. Smith, 392 U.S. 307 (1968), and the 'suitable home' policy designed to exclude children because of their mother's allegedly improper behavior.
>
> "As evidence of present discrimination plaintiffs point to the state appropriations for 1968.

The OAA program was allocated $48,162,898.76 for 229,654 recipients, while AFDC was allocated $6,149,427.73 for 138,942 recipients, more than 6 times the funds for less than twice the number of recipients.

"The plaintiffs contend that the difference in the appropriations for AFDC and the other groups is violative of the Equal Protection Clause because there is a larger percentage of Negroes and Mexicans in AFDC than in the other categories.

"Plaintiffs contend that in order to remove the discrimination between categories, recipients of AFDC should receive 95%-100% of unmet needs. They seek to have Section 51-a Article III of the Texas Constitution held unconstitutional because it sets a limit on the amount of funds that the Legislature may expend on the various welfare programs. However, if the provisions of Section 51-a were declared invalid, the entire program of welfare would be destroyed, since this section is the only authorization which the Legislature has to appropriate money for the needy. Should this authorization be declared invalid, then 51-a prohibits the Legislature from making any grant of public moneys to any individual. Apparently under this contention plaintiffs desire this Court to take over the responsibilities of the people to amend the Constitution and of the Legislature to allocate funds. This we do not intend to do.

"To remove the alleged discrimination, however, it would not be necessary to pay 100% of the unmet needs. It would be necessary only to balance the payments to meet like percentages of need throughout the various categories.

"We will therefore address ourselves merely to the question of whether there is discrimination between the various categories based on racial or ethnic prejudice. From an examination of the stipulations we have concluded that the plaintiffs have

failed to make a sufficient showing of racial or ethnic discrimination.

"We have based our conclusions on the following:

"1. There has never been a reduction in the amount of money appropriated by the Legislature to the AFDC program. (Stipulation No. 54).

"2. Since 1943 there have been five increases in the amount of money appropriated by the Legislature to the AB and AFDC programs and six increases in the OAA program. (Stipulation Nos. 48 and 49).

"3. Since 1959 there have been two increases in the amount of money appropriated by the Legislature to the AFDC program. (Stipulation No. 50).

"4. Since 1943 the appropriation by the Legislature to the OAA, AB and AFDC programs have increased by the following percentages:

OAA—211%
AB—200%
AFDC—410%
(Stipulation No. 51).

"5. Since 1963 the appropriation by the Legislature to the OAA, AB, AFDC and APTD programs have increased by the following percentages:

OAA—13%
AB—0
AFDC—58%
APTD—183%
(Stipulation No. 53).

"6. The majority of the AFDC families having their grant raised on May 1, 1969, were large families and the large family groups receiving AFDC assistance grants are predominately Negro and Mexican-American. (Stipulation Nos. 38 and 39).

"7. In January, 1969, the Legislature authorized the expenditure of an additional $350,000.00

in the AFDC program for the fiscal year ending August 31, 1969. (Stipulation No. 72).

"8. The Legislature has submitted a constitutional amendment to be voted on in August, 1969, which would authorize the Legislature to appropriate up to $80,000,000.00 for assistance grants in the OAA, AB, APTD and AFDC programs. If adopted, the present plan is to recommend to the Legislature an increase of $11,900,000.00 in the AFDC program which will then permit AFDC recipients to be paid 100% of unmet need. (Stipulation No. 75).

"9. Under the proposed plan for appropriations, if the amendment is adopted, the AFDC program would receive $11,900,000.00 of the $15,000,000.00 in additional funds available to operate the OAA, AB, APTD and AFDC programs. (Stipulation No. 76).

"10. Recipients in the AB program being paid 95% of need are 54.2% Negro and Mexican-American and 44.3% white-Anglo. (Stipulation Nos. 23 and 31).

"11. The depositions of Welfare officials conclusively establish that the defendants did not know the racial make-up of the various welfare assistance categories prior to or at the time when the orders here under attack were issued."

In addition to the foregoing undisputed and stipulated facts forming the basis of the decision of the court below upon Appellants' racial allegations, the Appellees would also call the Court's attention to the following Stipulations which further establish clearly the lack of racial motivation or effect in the allocation of funds between the various categories of welfare assistance by the Legislature of Texas:

"...

"52. In the past 26 years the appropriations by the Legislature of the State of Texas have been in-

creasing in the AFDC program at approximately twice the rate as in the OAA and AB programs." (App. 78).

"...

"56. That under Art. III, Sec. 51-a of the Texas Constitution, any increase in the amount of money presently being appropriated by the legislature of the State of Texas to the AFDC program would result in the amount of money available in the OAA, AB and APTD programs being reduced." (App. 79).

"...

"80. That if the relief sought by the plaintiffs is granted it could result in the assistance grants of approximately 117,933 Negro and Mexican-Americans in the AFDC program being increased, assuming the budgeting procedures as per E-430 and E-434 and the present operation of the welfare plan remain constant and remain the same as presently operated." (App. 84).

"81. That if the relief sought by the plaintiffs is granted it could result in the assistance grants of approximately 95,360 Negro and Mexican-Americans in the OAA, AB and APTD programs being lowered, assuming the budgeting procedures as per E-430 and E-434 and the present operation of the welfare plan remain constant and remain the same as presently operated." (App. 84).

"82. That if the relief sought by the plaintiffs is granted it could result in the assistance grants of approximately 61,968 Negroes in the AFDC program being increased, assuming the budgeting procedures as per E-430 and E-434 and the present operation of the welfare plan remain constant and remain the same as presently operated." (App. 85).

"83. That if the relief sought by the plaintiffs is granted it could result in the assistance grants of approximately 56,107 Negroes in the OAA, AB and

APTD programs being lowered, assuming the budgeting procedures as per E-430 and E-434 and the present operation of the welfare plan remain constant and remain the same as presently operated." (App. 85).

As can be seen from the foregoing stipulations, the Legislature of the State of Texas has been increasing the funds available in the AFDC program twice as fast in the last 26 years as in two of the three other programs. In fact, since 1969, as previously noted, the total amount of funds available in the AFDC program has increased by almost 400%.

In addition, the foregoing stipulations reveal that Appellants' theory of balancing the allocations between the various welfare categorical programs actually disprove the racial assertions of the Appellants. While under Appellants' theory 117,933 Negro and Mexican-Americans in the AFDC program would have their assistance grants raised (Stipulation No. 80), it would in turn lower the assistance grants of 95,360 Negro and Mexican-Americans in the OAA, AB and APTD programs (Stipulation No. 81). While under Appellants' theory 61,968 Negroes would have their assistance grants raised in the AFDC program (Stipulation No. 82), it would lower the assistance grants of 56,107 Negroes in the OAA, AB and APTD programs.

Under Appellants' theory what really would be happening on a racial basis, would be that approximately the same number of individuals in the AFDC program would be benefited as would be penalized in the OAA, AB and APTD programs.

What could more graphically reveal the lack of racial motivation or effect on the allocation of moneys by the Legislature of Texas between the welfare programs than the above undisputed and stipulated facts? Some

merit might be given to Appellants' argument of racial motivation or effect in the allocation of funds if their theory had demonstrated that an equal allocation between the programs would have resulted in a large benefit to racial or ethnic groups without any corresponding penalty. However, this is undisputedly not the case, and in fact it further establishes that the allocation of funds by the Legislature of Texas between the various categories of welfare programs is not racially discriminatory in either purpose or effect so as to make it inherently suspect.

Such being the case, the court was not only correct in refusing to sustain Appellants' equal protection and civil rights allegations, but was also correct in applying the traditional equal protection test rather than the "compelling interest test" in weighing the validity of regulations of the Appellees and the legislative enactments of the State of Texas.

In conclusion, it should be noted that Appellants have attempted to give the impression that the court below based its decision, that there had been a failure to make a showing of racial or ethnic discrimination, almost solely on the fact that the Appellees did not know the racial make-up of the welfare assistance categories prior to or at the time when the orders under attack were issued. (See in this connection the depositions of Hackney, p. 91; Sarazan, p. 54-55; Chapman, p. 52). If so suggesting, the Appellants no doubt are seeking to discredit the decision of the court below by trying to suggest that the court only took into consideration motivation or intent in its decision. The record before this Court, and the undisputed facts and stipulations quickly dispell this position, as they clearly show that the court below took into consideration effect as well as motivation and intent.

In view of the foregoing, Appellees submit that this Court should sustain the action of the court below in its decision that neither the regulations of the Appellees nor the enactments of the Legislature of the State of Texas, here challenged, violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States or the Civil Rights Act of 1964.

> "Whether the use by Texas of something other than the adjusted standard of need in determining eligibility for benefits pursuant to the AFDC program violates Section 402(a) (23) of the Social Security Act?"

Before proceeding with the argument upon Appellants' statutory claim that the method used by Texas in determining eligibility of welfare recipients is in conflict with 42 U.S.C. §602(a) (23), both the Appellants and this Court are faced with a threshold issue or question both serious and far-reaching in effect.

> "DOES THERE EXIST AN ACTUAL AND JUSTICIABLE CONTROVERSY BETWEEN THE APPELLANTS AND THE APPELLEES AS TO THE STATUTORY GROUNDS ASSERTED BY APPELLEES AND THUS DO APPELLANTS LACK THE NECESSARY STANDING?"

At no time during the trial of this case did the Appellants plead, prove or urge that the manner in which Appellees determined eligibility was in conflict with or violation of 42 U.S.C. §602(a) (23). Only after this proceeding had been appealed initially to this Court and the judgment vacated for further consideration in light of this Court's decision in *Rosado v. Wyman, supra,* and the court below had entered another judgment denying all of the relief sought by Appellants,

did the issue of the manner Appellees were determining eligibility raise its head, and then only by the way of the Appellants' motion to amend the judgment entered by the court below which is now the subject of this appeal.

However, none of the Appellants presently before this Court are affected by the manner in which Appellees are determining eligibility of those seeking welfare assistance. The Stipulations of Fact Nos. 3, 4, 5, 5a and 5b (App. 65-66) show that none of the Appellants before this Court have lost their eligibility for welfare assistance. The only party whose eligibility was terminated by Appellees' regulations here under attack was Maria T. Davila (Stipulation No. 1, App. 64), and on October 3, 1969, before the initial appeal of this case, this party, Maria T. Davila, along with another party, requested the court below to dismiss their appeal and this was done (Docket Entry, App. 13).

Consequently, the only party who has ever been in this litigation, whose eligibility was ever affected, was Maria T. Davila and she has not been a party to this proceeding since prior to the initial appeal in this case, and was not a party at the time Appellants first raised their statutory arguments based on the manner in which the Appellees determine eligibility and which is now being asserted before this Court.

Such being the case, the Appellees submit that there is no actual controversy between these Appellants or the class they represent and the Appellees upon the issue of whether the Appellees' method of determining eligibility conflicts with 42 U.S.C. §602(a) (23). Appellants are merely attempting to use this litigation as a vehicle to attempt to have this Court render an advisory opinion on an issue they would like to have re-

solved, but one which is not in controversy between the parties before this Court.

The reason for such an attempt is obvious. In the initial proceeding before the court below, the Appellants lost their equal protection argument, but prevailed in their statutory argument that the ratable reduction method Texas was using in making welfare assistance payments to recipients (paying only a percentage of the cost of living adjusted standard of need) was in conflict with 42 U.S.C. §602(a) (23), when the court below followed the logic of the dissenting opinion in *Lampton v. Bonin,* 304 F.Supp. 1384 (E.D. La. 1969), vacated and remanded for reconsideration in light of *Rosado v. Wyman,* 397 U.S. 663 (1970). However, the decision by this Court in *Rosado v. Wyman, supra,* sustained the type of ratable reduction method being used by Texas, and under attack by the Appellants, and this new type of statutory challenge was all that was left to Appellants in an attempt to salvage something from their statutory arguments.

This attempt to change horses in midstream might have been successful if the horseman had fit the saddle on the new horse, but this is where the Appellants encounter difficulty. None of the Appellants before this Court in this appeal fit the mold of the type of complainant needed to raise the statutory issue being raised. None of the Appellants have had their eligibility affected by the challenged regulations, and no decision this Court might make on the statutory question here presented will affect them in any way.

The decision by this Court in *Flast v. Cohen,* 392 U.S. 83, 20 L.Ed.2d 947, 88 S.Ct. 1942 (1968), is one of the most recent and extensive decisions examining this issue now once again before the Court. The following

statements from this Court's opinion are most revealing in view of the facts here presented:

"The jurisdiction of the federal courts is defined and limited by Article III of the Constitution. In terms relevant to the question for decision in this case, the judicial power of federal courts is constitutionally restricted to 'cases' and 'controversies.' ... Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process....

"Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action....

"... And it is quite clear that 'the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.' C. Wright, Federal Courts 34 (1963). Thus, the implicit policies embodied in Article III, and not history alone, impose the rule against advisory opinions on federal courts.... However, the rule against advisory opinions also recognizes that such suits often 'are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests.' United States v. Fruehauf, 365 US

146, 157, 5 L Ed2d 476, 483, 81 S Ct 547 (1961). Consequently, the Article III prohibition against advisory opinions reflects the complementary constitutional considerations expressed by the justiciability doctrine: Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.

"...

"... The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' Baker v. Carr, 369 US 186, 204, 7 L Ed2d 663, 82 S Ct 691 (1962). In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable.... A proper party is demanded so that federal courts will not be asked to decide 'ill-defined controversies over constitutional issues,' United Public Workers v. Mitchell, 330 US 75, 90, 91 L Ed 754, 768, 67 S Ct 556 (1947), or a case which is of 'a hypothetical or abstract character,' Aetna Life Insurance Co. v. Haworth, 300 US 227, 240, 81 L Ed 617, 621, 57 S Ct 461, 108 ALR 1000 (1937)....

"... It is for that reason that the emphasis in standing problems is on whether the party invoking federal court jurisdiction has 'a personal stake in the outcome of the controversy,' Baker v. Carr, supra, at 204, 7 L Ed2d at 678, and whether the

dispute touches upon 'the legal relations of parties having adverse legal interests.' Aetna Life Insurance Co. v. Haworth, supra, at 240-241, 81 L Ed at 621, 108 ALR 100. . . ."

In view of the foregoing, the Appellees submit that this Court should not entertain Appellants' statutory issues because there does not exist the necessary standing on the part of the Appellants or an actual or justiciable controversy between the Appellants and Appellees. The Appellants are merely seeking an advisory opinion, and for this reason as well as the foregoing this Court lacks jurisdiction.

While the Appellees submit that the foregoing forecloses further consideration of Appellants' statutory arguments, the Appellees do wish to comment upon the statutory grounds asserted by Appellants.

As noted previously, Appellants' initial challenge to the regulations promulgated by Appellees dealt with the issue that 42 U.S.C. §602(a) (23) did not allow the State to employ ratable reductions to reduce welfare expenses within available funds. However, this Court's decision in *Rosado v. Wyman, supra,* was adverse to Appellants' initial contention, and this Court in *Jefferson v. Hackney,* 397 U.S. 821 (1970) (App. 158), vacated the decision of the court below in sustaining Appellants' statutory position because of the decision in *Rosado v. Wyman, supra.*

Having been blocked in their attempt to challenge the Texas regulations concerning the percentage of recognized need that would actually be paid eligible welfare recipients, the Appellants have now changed the thrust of their attack to the new issue of determining eligibility to receive welfare assistance grants—an issue not before this Court in *Rosado v. Wyman, supra.*

The Appellants now contend that the Texas method[1], of applying any attributable income to a ratably reduced standard of need rather than first applying income to need and then applying the ratable reduction to any remainder, violates 42 U.S.C. §602(a) (23).

In support of this contention that the Texas method of determining eligibility used in all categories of welfare assistance programs, violates 42 U.S.C. §602(a) (23), the Appellants have literally deluged the Court with legislative history, and a myriad of conjectures from every imaginable source. This form of authority may indeed be helpful and even persuasive to the Court when attempting to ascertain congressional intent when a statute is vague or indefinite in meaning. However, the Appellees submit that the provisions of 42 U.S.C. §602(a) (23) do not lend themself to the interpretation sought by Appellees. When Congress enacted the following language:

> "A State plan for aid and services to needy families with children must . . .
>
> "(23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

the purpose and objective projects itself clearly from the language of the enactment. Congress was requiring the states to up their recognized standards of need to reflect the rising cost of living since the date the standards had originally been set. As this Court held in *Rosado v. Wyman, supra,* the purpose was not to man-

[1]Approved by HEW and used in 19 other states. Memorandum for the United States as Amicus Curiae.

datorily require the states to spend more money on their welfare programs—merely, to make the states recognize the rise in the cost of living and hopefully prod the states into increased monetary expenditures to offset the rising cost of living.

The Appellants would now have this Court read into the plain and simple language of this congressional enactment an entirely new subject both comprehensive and far-reaching in effect. Appellants seek to have this Court impute to Congress the intention to alter the eligibility requirements for receiving welfare assistance in a manner to further enlarge the welfare programs of the states—many of whom find their fiscal resources inadequate to presently handle existing programs.

A matter of such significance and impact does not normally find itself hidden so skillfully in congressional statutes as Appellants tend to suggest. Appellees submit that to indulge in the interpretation sought by the Appellants as to the provisions of 42 U.S.C. §602(a)(23) comes close to depriving Congress of its traditional and constitutional function of making the decision of whether eligibility requirements in the welfare programs are to be altered and if so, in what manner. Certainly, in a matter as significant and far-reaching as changes in eligibility in programs of the size and complexity as here being dealt with, the desire of Congress should speak clearly on the subject and not be expanded on the basis of mere speculation or conjecture. It seems vastly more reasonable to assume that had Congress sought to revamp eligibility standards in the AFDC program they would have used a much more direct approach rather than obscuring it in a statute dealing with another topic in the hopes that it might be discovered and acted upon.

The Appellants have also attempted to use some of the language of this Court in *Rosado v. Wyman, supra,* as authority that the states cannot use the ratably reduced standard of need in determining eligibility. This argument, however, ignores the fact that *Rosado v. Wyman, supra,* dealt not with eligibility but with the issue of whether a state could pay less than the adjusted standard of need.

While the Appellants seek to read into *Rosado v. Wyman* a virtual goldmine of ways to expand upon what the provisions of 42 U.S.C. §602(a) (23) actually provide, it might prove helpful to look once again at the language of this decision devoid of the interpretations sought by the Appellants:

> "There are two basic factors that enter into the determination of what AFDC benefits will be paid. First, it is necessary to establish a 'standard of need,' a yardstick for measuring who is eligible for public assistance. Second, it must be decided how much assistance will be given, that is, what 'level of benefits' will be paid. *On both scores Congress has always left to the States a great deal of discretion. King v. Smith,* 392 U.S., at 318.
>
> "...
>
> "Reverting to the language of §402(a) (23) we find two separate mandates; first, the States must re-evaluate the component factors that compose their need equation; and, second, any 'maximums' must be adjusted.
>
> "We think two broad purposes may be ascribed to §402(a) (23): First, to require States to face up realistically to the magnitude of the public assistance requirement and lay bare the extent to which their programs fall short of fulfilling actual need; second, to prod the States to apportion their payments on a more equitable basis.

"...

"'The congressional purpose we discern does not render §402(a) (23) a meaningless exercise in 'bookkeeping.' Congress sometimes legislates by innuendo, making declarations of policy and indicating a preference while requiring measures that, though falling short of legislating its goals, serve as a nudge in the preferred directions. *In §402(a) (23) Congress has spoken in favor of increases in AFDC payments.* While Congress rejected the mandatory adjustment provision in the administration bill, it embodied in legislation the cost-of-living exercise which has both practical and political consequences.'' (Emphasis added.)

The interpretation of 42 U.S.C. §602(a) (23) which Appellants seek is a most unusual one when it is viewed realistically and in actual operation. *Rosado v. Wyman* does not require the states to expend more money in the operation of their welfare programs and recognizes that the states may pay in welfare grants an amount less than the adjusted standard of need consistent with the funds they have available. However, the Appellants seek to have the Court interpret 42 U.S.C. §602(a) (23) in such a manner as to require additional applicants to be placed upon the welfare rolls by altering eligibility standards being used. In the case of Texas, which has a fixed maximum that it can expend for its welfare programs, the effect is obvious. The percentage of the adjusted standard of need that is actually paid the recipient will have to be reduced. This result would hardly seem to be the one envisioned by Congress when it enacted 42 U.S.C. §602(a) (23). It also seems to be a somewhat strange posture for the Appellants to find themselves in—that of advocating a position which if sustained, can only result in the reduction of the assistance grants they now have.

Perhaps the irony of Appellants whole position is that it results in harming those welfare recipients who need assistance most. Perhaps the Appellants might do well to consider the statement made by this Court in its concluding statements in *Dandridge v. Williams, supra:*

> "We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration, Goldberg v. Kelly, ante, p. 254. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients. Cf. Steward Mach. Co. v. Davis, 301 U.S. 548, 584-585; Helvering v. Davis, 301 U.S. 619, 644."

In conclusion, Appellees would like to commend the Solicitor General for its very studied and comprehensive Memorandum for the United States as Amicus Curiae. The Appellees agree with both the general reasoning and the conclusion reached by the Solicitor General therein.

In view of the foregoing, the Appellees submit that the Appellants have failed to show the presence of any actual controversy between themselves and Appellants upon the statutory issues here raised and therefore they are seeking nothing more than an advisory opinion which this Court should refrain from entertaining.

In addition, the Appellees submit that the court was correct in denying the Appellants the relief they sought upon the statutory issues raised and should be sustained.

CONCLUSION

This case can best be summarized as another of a virtual torrent of litigation, which is practically inundating the judicial system, and which seeks to challenge practically every legislative and administrative act of the states connected with welfare programs. While these suits of necessity must allege constitutional or statutory grounds as their basis, all too frequently, as here, these asserted constitutional and statutory grounds are nothing more than a vehicle upon which to bring before the courts an argument dealing not with pressing constitutional or statutory issues, but in reality a particular litigant's desire to have the legislative bodies of this country respond to a particular desire in a particular manner. This approach, however, should be pursued in the halls of Congress and the legislatures of the states—not before the courts. The notion that the United States Constitution empowers the federal courts to judge the wisdom of the means by which a state undertakes to further a legitimate interest has long been rejected by this Court. Federal courts are not empowered to sit as a "super-legislature to determine the wisdom, need, and propriety of laws." *Griswold v. Connecticut,* 381 U.S. 479, 482, 85 S.Ct. 1678, 14 L.Ed. 2d 510, 513 (1965); *Munn v. Illinois,* 94 U.S. 113, 24 L. Ed. 77 (1876). The United States Constitution does not give the federal courts the power to judge the wisdom of the legislative choice and turn the court's disagreement with that choice into a constitutional prohibition. *Beauharnias v. Illinois,* 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919 (1952); *Ferguson v. Skrupa,* 372 U.S. 726,

83 S.Ct. 1028, 10 L.Ed.2d 93 (1963); *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 653 (1955).

In view of the foregoing Appellees submit that the judgment of the United States District Court for the Northern District of Texas, Dallas Division, entered on August 4, 1970, should be affirmed.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant Attorney General

ALFRED WALKER
Executive Assistant Attorney General

J. C. DAVIS
Assistant Attorney General

PAT BAILEY
Assistant Attorney General

P. O. Box 12548
Capitol Station
Austin, Texas 78711

Attorneys for Appellees

SERVICE

I, Pat Bailey, one of the attorneys for the Appellees and a member of the Bar of the Supreme Court of the United States, hereby certify that on the —— day of January, 1972, I served a copy of the foregoing Brief of Appellees on the Appellants by depositing a copy in the United States Mail, postage prepaid, and addressed to the attorneys of record for Appellants as follows: Steven J. Cole and Henry A. Freedman, Center on Social Welfare Policy and Law, 401 West 117th Street, New York, New York 10027; Carl Rachlin, Hunter College, New York, New York 10021; Edward V. Sparer, University of Pennsylvania School of Law, 3400 Chestnut Street, Philadelphia, Pennsylvania 19104; and Ed J. Polk, 800 Main Street, Dallas, Texas 75202.

PAT BAILEY